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IN THE

Supreme Court of the United States

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK and FLORENCE FISHER DUNWOODY, Executors under the Will of Mamie DuBan, Deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED.

In an action brought by the executors of a deceased widow against a lawyer who had represented her to the date of her decease, and who sought to defend on the ground of an alleged oral agreement with the decedent, can it be held that the defendant was deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States because the trial court proceeded to the trial after seven continuances granted to the defendant on the ground of illness or other causes, but afforded the defendant ample opportunity to testify by depositions in the privacy of his own office and his depositions were taken, transcribed and offered in evidence at the trial, but their admission was refused because the defendant was incompetent under the laws of the State to testify as to any matters alleged to have occurred between him and his deceased client in her lifetime?

STATEMENT OF THE CASE.

This case involves an action in assumpsit brought on March 10, 1954 by the respondents as Executors of the estate of Mamie DuBan, who died at Philadelphia, November 8, 1953, at the age of 86 years, to recover from the petitioner, Harry J. Alker, Jr., the value of 1,925 shares of common stock of the National Dairy Products Corporation and a sum equivalent to a dividend declared and paid thereon on December 10, 1953, with interest.

There is no dispute as to the following facts which were established either by admissions in the pleadings offered in evidence, admissions of counsel for petitioner at the trial or established by documentary proof the authenticity of which is unquestioned.

In 1930 and 1931 the petitioner, who had long been a close personal friend and legal adviser of Alfred A. DuBan, the husband of Mamie DuBan, borrowed at four different times an aggregate of 4,400 shares of stock of National Dairy Products Corporation, the stock of which was then and continues to be listed and dealt in daily on the New York Stock Exchange. At the time the loans were made petitioner gave to Mr. DuBan written evidence of his obligation to return the stock "upon demand if not sooner" and petitioner delivered to Mr. DuBan as collateral security an insurance policy for $50,000. on the life of petitioner in the Metropolitan Life Insurance Company and a certificate for 125 shares of stock of Mrs. Smith's Pie Company, with assignments thereof. The Dairy Corporation stock was, with Mr. DuBan's consent, deposited by the petitioner with the Integrity Trust Company, of Philadelphia, as further collateral for loans made by that Company to the petitioner. The stock remained in Mr. DuBan's name and all dividends declared thereon were paid directly to Mr. DuBan during his lifetime.

Alfred A. DuBan died on November 12, 1938 and his wife was Executrix and sole beneficiary under his will. The petitioner was counsel for Mrs. DuBan in the settlement of her husband's estate and continued to act as her legal adviser until her decease.

Mrs. DuBan received directly as Executrix all dividends paid on the 4,400 shares of Dairy Corporation stock until December 1942. Sometime in 1942 the shares of stock were transferred by the Federal Deposit Insurance Corporation, assignee of the Integrity Trust Company, unto itself and Mrs. DuBan thereafter received no further dividends from the Dairy Corporation. Beginning in December 1942 (R. 278a) the petitioner paid to Mrs. DuBan amounts equivalent to all dividends as they were declared and paid on the unreturned stock until the time of her death, his checks being frequently enclosed in letters (R. 278a, 285a, 286a). The petitioner returned to Mrs. DuBan at various times an

aggregate of 2,475 shares so that at the time of her death he owed to her 1,925 shares.

On April 12, 1946 Mrs. DuBan as Executrix of her husband's estate and at the suggestion of the petitioner executed a paper prepared by the petitioner, assigning unto herself individually the claim of the estate against certain persons including the "claim against Harry J. Alker, Jr. together with all interest of the estate in the Metropolitan Life Insurance policy assigned as collateral." The insurance policy, premiums on which had been paid by the petitioner and the assignment of the certificate for 125 shares of stock of Mrs. Smith's Pie Company were found in Mrs. DuBan's apartment after her death. The certificate for the Pie Company stock was found in her safe deposit box.

On December 10, 1953 the Dairy Corporation declared and paid a dividend which on the 1,925 shares unreturned amounted to $1,443.75. The petitioner did not make payment to Mrs. DuBan's estate of this amount. Nor did the petitioner return the 1,925 shares of stock although formal demand for the return thereof by March 8, 1954 and for the payment of a sum equivalent to the dividend was made by the Executors of Mrs. DuBan's estate on February 24, 1954. This suit claiming $126,067.50 the admitted value on March 8, 1954 of the unreturned stock and the dividend and interest was thereupon instituted.

The sole defense interposed by petitioner was that he had entered into an oral agreement with Mrs. DuBan that if he paid to her sums equivalent to the dividends declared and paid on the unreturned shares of Dairy Corporation stock during her lifetime and made no charge to her for services rendered to her or her deceased husband then upon her death he was to be under no further obligation to her or her estate with reference to any shares he had not returned to her.

After seven continuances upon application of the petitioner, the case was tried before Honorable Raymond J.

MacNeille, P. J., Common Pleas No. 3, without a jury and on July 10, 1956 the trial judge filed an opinion finding for the respondents in the sum of $143,876.42. Exceptions were filed by the petitioner. After some further maneuvering by the petitioner the exceptions were argued before the court en banc and dismissed. Judgment was thereupon entered for the respondents on July 9, 1957.

Upon appeal of the petitioner to the Supreme Court of Pennsylvania the judgment was affirmed in a per curiam opinion, 392 Pa. 47; 139 A. 2d 901, the appellate court finding that "the record has failed to disclose the slightest merit in any of the appellant's assignments of error."

Subsequently the petitioner filed a petition for reargument which the Supreme Court of Pennsylvania denied.

ARGUMENT.

I. THE REFUSAL OF THE TRIAL JUDGE OF PETITIONER'S APPLICATION FOR FURTHER CONTINUANCE WAS NOT AN ABUSE OF DISCRETION NOR A DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

At the outset it should be borne in mind that the action was instituted by the Executors of a decedent's estate and under the law of Pennsylvania the petitioner was incompetent to testify as to any matters or things happening prior to the death of the decedent (R. 316a, 317a).

The action was instituted on March 9, 1954. Prior to March, 1956 the case had been listed for trial seven times and the petitioner on the ground of illness or other cause had procured continuances over the objection of counsel for the respondents. On the preliminary call of the list for

March 1956, no application was made by petitioner for a continuance as required by the rules of the local court and the case was listed for trial on March 27, 1956. On March 5, 1956 the petitioner and his counsel were notified that the respondents would insist upon the trial of the case when it was called on March 27, 1956. When on March 27, 1956 the respondents, with their counsel and witnesses were present in court and ready to proceed with the case, counsel for the petitioner, without any previous notice to the respondents, made application to the trial judge for a further continuance for two months on the grounds of illness of the petitioner and in support of such application called one Dr. Ronald C. Moore. A most cursory reading of the testimony of Dr. Moore will be convincing that the trial judge committed no abuse of discretion in granting a continuance to enable the petitioner to testify by depositions in the quiet of his own office with the understanding that when the depositions were completed the court would proceed with the trial.

The petitioner's contention that he was not accorded due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States is fully answered by the following quotation from the opinion of the court below en banc sur the petitioner's exceptions to the findings of the trial court (R. 350a).

> "The defendant contends (exceptions 1, 2 and 24) that he was not afforded due process of law because the trial judge refused his request for further continuance on March 27, 1956. The events are properly set forth in the trial judge's opinion as follows:
>
> 'When the case was called for trial on March 27, 1956, a plea for continuance was made on the ground of the defendant's ill health. Out of consideration for this circumstance and respect for the opinion expressed by a medical attendant of the defendant, the court granted a continuance and gave the defendant leave to testify in deposition form in his own office,

subject, of course, to objection by the plaintiffs on the ground of the defendant's incompetency. The defendant's deposition was so taken, transcribed and filed. The matter then came on for trial on April 25, 1956.'

It may therefore be noted that in actual effect the defendant was granted a continuance of one month. The depositions began on March 28, 1956 and were continued at the defendant's request until April 16, 1956. There was then a further continuance at the defendant's request and the depositions were concluded on April 20, 1956. This case was called for trial after the trial date had been fixed at a preliminary call of the trial list and no request for continuance was made at the time of the preliminary call: See Pa. R. C. P. 216 (c). As stated by the plaintiffs in their brief, '. . . prior to March, 1956, (this) case had been listed for trial at least seven times and the defendant on the ground of illness or other cause had procured continuances'. We may briefly note that the complaint was filed on March 9, 1954 and the action involved serious and substantial allegations with regard to a member of the bar of this court. Although an attorney does not by virtue of such office forfeit any of his rights as a litigant, we are of the opinion that his conduct should be most carefully scrutinized and he should be prevented from using his skills to procure interminable delays in the disposition of litigation against himself. In this case we are fully satisfied, without reference to personalities, that the matter was ripe for disposition; that any further delay was not in the interest of justice. The grant or refusal of a continuance is a matter within the reasonable discretion of the trial judge; Anderson v. Guerrein Sky-Way Amusement Co., 346 Pa. 80 (1943); McNernie v. W. S. Peace, Inc., 344 Pa. 24 (1942); State Board of Medical Education and Licensure v. Williams, 172 Pa. Superior Ct. 448

(1953); and we are satisfied that there was no abuse of discretion by the trial judge."

The petitioner had from March 1954 until March 1956 to prepare for the trial of the case and to furnish to his numerous counsel all of the information that was available for his defense. Prior to, at the time of the trial and immediately subsequent thereto, the petitioner was continuously going to his office each day and continuing the usual activities incident to the practice of his profession.

Truly, as the court below said (R. 354a) "defendant has deliberately and improperly delayed the disposition of this case; that he has used various devices, such as changing counsel and asserting ill health, to that end."

II. THERE IS NOT PRESENTED ANY FEDERAL QUESTION TO WARRANT THE GRANT OF CERTIORARI BY THIS COURT.

It is apparent that the petitioner was afforded a full and fair trial in accordance with the settled judicial procedure of the Commonwealth of Pennsylvania and it has been so determined by the trial judge, the court below en banc, and the Supreme Court of Pennsylvania. It is well settled that this court will not grant review of such a case.

The Fourteenth Amendment to the Constitution of the United States in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations may be enforced, provided the method of procedure adopted for the purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. *Iowa Central Railway Co. v. Iowa*, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467.

Furthermore the Pennsylvania rule that the grant or refusal of a continuance is a matter within the reasonable discretion of the trial judge is uniformly followed in all juris-

dictions and is in accord with that laid down by this Court in numerous cases involving the refusal of a continuance by federal trial courts.

> "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Hardy v. United States*, 186 U. S. 224, 22 S. Ct. 889, 46 L. Ed. 1137. Citing *Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229, and authorities there cited. See also *Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343 and *Fidelity & Deposit Co. v. L. Bucki & Son*, 189 U. S. 135, 23 S. Ct. 582, 47 L. Ed. 744.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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